



<u>Decision Ref:</u>	2019-0257
<u>Sector:</u>	Banking
<u>Product / Service:</u>	Repayment Mortgage
<u>Conduct(s) complained of:</u>	Fees & charges applied (mortgage)
<u>Outcome:</u>	Upheld

**LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN**

Background

The Complainant holds a mortgage with the Provider in relation to a buy to let property. The complaint relates to legal fees and charges which were applied to the mortgage account without the knowledge of the Complainant.

The Complainant states that he was not made aware until **July 2017**, that a rent receiver had been appointed over the property, after fees of over €2,000 had been applied to his account, even though he raised a query with the Provider in relation to the first charge applied to the account in **September 2016**. He accepts that the mortgage account fell into arrears between 2011 and 2016. He states that the fees and charges were applied to his account without authorisation or consent.

The Provider states that despite the Complainant being dissatisfied with the solicitors' fees applied to the account, it is not in a position to reverse these charges.

The Complainant's Case

The Complainant contacted this office indicating that he was having serious problems with his mortgage account in relation to solicitors' charges that been added to his account without his knowledge. The Complainant states that on a call on **21 September 2016**, he rang the Provider and spoke to B in relation to a sum of €152.60 added to his account. B

confirmed that these were solicitors' fees and the Complainant asked him to remove these. According to the Complainant, B said he would look into the matter by 28 September 2016 but failed to do so.

He states that he called the Provider again in **January 2017** in relation to the fees added to the accounts and pleaded with the Provider to stop adding the charges. The Provider stated that the matter would be looked at but, month by month, further charges were added over the next six months.

The Complainant states that he called the Provider on **12 July 2017** and spoke to X in relation to total charges of over €2,000 that had been added. He states that when he called again on 18 July, when X had not reverted as promised, he learned that a receiver had been appointed over the property and that some of the charges related to that appointment. He states that at no time was he aware of this. He further states that there had been no contact from the receiver to himself, to his management company, or to his tenants. He states that the Provider gave him a breakdown of charges in the sum of €1,536.75 but the real charges were more than €2,000. He states that had the Provider dealt with his query properly in January 2017, the additional charges applied thereafter would not have been necessary. He states that his account is up-to-date, other than the charges that were added and that the receiver has been discharged.

The Complainant has provided an email from his property management company dated 21 August 2017, advising that they been in place since March 2016, collecting rent of €1,100 per month which they continued to do. The email states that they received a phone call from the rent receiver on 20 July 2017 advising that they had been appointed receivers of the property and that the property management company should cease collecting further rent. The receivers were asked to forward a copy of the deed of appointment which had not yet been received by the property management company. This appears to have been the first contact from the receivers.

The Complainant is seeking a refund of all charges and fees applied to the account. He also states that he has been extremely stressed in relation to the issue since September 2016.

The Provider's Case

The Provider states that after a three year interest only period, the Complainant's mortgage converted to full capital and interest payments in 2011. The interest rate applying to the account is a tracker rate.

In relation to costs and expenses, the Provider relies on sections 12.2 and 12.4 of the terms and conditions of the mortgage agreement which provides that:

"The Mortgagor covenants to indemnify the [Provider] against and to pay all costs and charges incurred by the [Provider] of and incidental to: the protection, realisation and enforcement of [the Provider's] security including all legal costs charges and expenses incurred by the Provider or on its behalf."

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“All monies to which this Condition applies shall be a debt due from the Mortgagor to [the Provider] and shall form part of the Total Debt secured by the Property and be payable immediately to [the Provider] by the Mortgagor.”

The Provider states that an appointed third party issues invoices for work carried out in obtaining payment of the arrears, on balances outstanding on the mortgage account and preparatory legal work. It states that to ensure that it is reimbursed for paying this invoice, the amount paid is added to the amount owing to the customer's mortgage account.

The Provider states that it provided ample opportunity to the Complainant to contact it to discuss his account prior to the appointment of the solicitors or receiver and it provided relevant information indicating the consequences of not engaging with it, including the potential legal costs that might be involved. It states that in **May 2014**, the Complainant was offered an assisted voluntary surrender which proposed to limit the shortfall balance of the account to €200,000 but this was declined by the Complainant. It states that in **July 2014**, the Complainant was requested to clear his arrears in full and informed that his account would be forwarded to the Provider's legal team if he failed to do so.

The Provider states that by **September 2014**, the arrears on the account increased to over €80,000 with no payments made and it issued a letter of demand outlining the total that had become due. It states that on 29 September 2014, it passed the Complainant's account to its solicitors after the Provider was unsuccessful in its attempts to recover the arrears on the mortgage account.

The Provider states that the Complainant subsequently cleared the arrears balance of approximately €90,000 on **19 November 2014** but that subsequently, the Complainant again failed to meet monthly repayments and the account immediately reverted to an arrears situation. The Provider states that it actively attempted to contact the Complainant by telephone call and written correspondence but was unsuccessful. The Provider states that on 14 April 2015, it issued correspondence urging the Complainant to contact it regarding the arrears on the account and the consequences of not doing so. At this point, the arrears were €9,505.97. It states that as no contact was made, the account was reviewed and an instruction sent to the solicitors on 9 June 2015.

The Provider states that in letters requesting that the Complainant contact it to discuss the arrears on the accounts, an estimate of the cost of certain court proceedings for the possession of the property were provided to him.

The Provider has given a breakdown of the exact figure representing all legal fees that have been applied to the Complainant's account, which appear to total €1,536.75. It has also provided a breakdown of receiver's fees, which total €1,825.50. Total fees applied were therefore in the sum of €3,821.40. The Provider states that in October 2017, it refunded €2,303.10 in receivership fees and in December 2017, some additional fees in relation to the receivership were refunded on the account. The Provider states that the loan balance has been altered to reflect the reversal of the fees. It states that in total, it refunded a total of €3,144.50 to the Complainant's mortgage account.

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The Complaint for Adjudication

The complaint is that the Provider wrongfully and unfairly charged legal fees to the Complainant's mortgage loan account without his consent. In that context, the Complainant has expressed dissatisfaction about the application of receiver fees and he is unhappy that the Provider failed to adequately address his complaint regarding the fees applied to his account.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict. I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

A Preliminary Decision was issued to the parties on 12 July 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

In the absence of additional submissions from the parties, within the period permitted, the final determination of this office is set out below.

The dispute in this case centres on the entitlement of the Provider to debit the costs of legal and receivership fees to the Complainant's mortgage account. Despite the documentation furnished in evidence, it is not as clear as it should be, what fees were applied, what fees were refunded, and what fees remain payable by the Complainant. The Provider has given a breakdown of the exact figure representing all legal fees that have been applied to the Complainant's account, which appear to amount to **€1,536.75**. It has also provided a breakdown of receiver's fees, which total **€1,825.50**. It also refers to additional fees of €762.60 in relation to the receivership. The Provider states that total fees applied were in the sum of €3,821.40. The individual figures provided in the response of the Provider, when totalled, amount to €4,124.85.

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The Provider states that in October 2017, it refunded €2,303.10 in receivership fees and in December 2017, some additional fees (€762.60) in relation to the receivership were refunded to the account. The Provider states that the arrears on the loan balance have been altered to reflect the reversal of the fees. It states that in total, it refunded a total of €3,144.50 to the Complainant's mortgage account. Again these figures do not add up in calculation, as other figures advised by the Provider indicate that €3,065.70 has been refunded to the account.

In the most recent submission to this Office, the Provider states that total fees applied to the account were in the sum of €4,528.65 as the previous submissions did not include a fee of €707.25 in the earlier calculation. It also confirms that the refund of fees of €3,144.50 was a gesture of goodwill. The difference between these amounts approximates but does not equal the stated legal fees applied, so I am not satisfied that the Provider has provided clarity in relation to the fees applied and refunded.

Considering that the addition of fees to the Complainant's account is the subject matter of the present complaint, it is very disappointing and indeed a matter of some concern that the Provider has not been able to provide clarity to this Office and to the Complainant as to the exact fees that were debited to the account, the exact fees that were refunded, and the exact fees that remain on the account. I will return to this issue.

Correspondence in relation to Legal and Receivership Fees

By letter dated 16 May 2014, the Provider wrote to the Complainant noting a current arrears balance of €78,419.40 and recommending the assisted voluntary sale of the property based on the level of repayments, with a cap on the residual debt of €200,000. The letter noted that if the Complainant was not willing to accept this option, the Provider could progress to take alternative action to protect its security, which may result in immediate legal action. The letter noted that

"Any fees incurred by the [Provider] during Legal action and/or sale of the property (e.g. legal fees, estate agent) will be billed to your account(s). Your agreement to progress with a private sale will avoid the possibility of the [Provider] taking immediate legal action and avoid the occurrence of such fees."

There appears to have been a meeting between the Complainant and a representative of the Provider which was followed up by a proposal from the Complainant in relation to the residual debt after the sale of the property by way of a letter dated 30 June 2014. By letter dated 11 of July 2014, X responded to the Complainant noting that the offer in writing dated 16 May 2014 was in line with what was discussed and if he was unwilling to go ahead with the offer, he would need to clear the arrears on their mortgage which currently stood at €80,576.16 and to resume full capital and interest repayments of €2,148.22.

A letter of demand was issued to the Complainant dated **12 September 2014**, demanding repayment within 10 days and noting arrears of €84,872.60. The demand letter noted that the Complainant would remain liable for any residual debt after the sale of the property which included legal and selling costs. This letter is important because it is one that the

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Provider relies on by way of notification to the Complainant that legal fees would be added to his account. The letter states that *“In the event of the sale of the Property”* the Complainant would remain liable to pay the outstanding amount including *“other related costs or charges as applicable”*. The letter also includes an estimate of costs. It states that:

“If Circuit Court proceedings seeking possession of the Property are instituted and same were not defended, [the Provider] may incur costs up to the sum of €4,500, which will be payable by you. If the Circuit Court proceedings for possession of the Property are contested or if adjournments are granted, a higher figure for costs may apply. You will also be liable for legal costs, which you have incurred in retaining your own legal advisers (if any).”

On any reading of this letter, the legal fees that the Complainant was advised of would arise when, and only when, possession proceedings were issued by the Provider. In the present case, no such proceedings were issued by the Provider.

By letter dated **14 April 2015**, the Complainant was advised that there was an arrears amount of €9,505.97 on the account. The letter advised that if the Provider did not hear from the Complainant within 10 days, he might be considered as not cooperating. The letter also noted that the cost of any possession proceedings would be payable by the Complainant.

By letter dated **20 July 2016**, the Provider noted that arrears on the account were €25,337.21 and stated that if the Complainant failed to make contact within seven days to clear the arrears in full, it was the intention of the Provider to appoint a receiver to act on the Provider’s behalf. The letter noted that no court order was required to enable it to take this step as it was in accordance with its powers under the mortgage deed. The letter noted that the appointment of a receiver meant that the Complainant would no longer be entitled to collect rent on the property as the receiver would take control of the tenancy and rent would be collected directly to the Provider.

The letter noted as follows

“you will be liable for all costs associated with the appointment of the Receiver on the occupancy check, along with any related expenditure incurred in the course of the receivership.”

The receiver warning letter of **20 July 2016** also gave an estimate of costs for possession proceedings of €6,500 in the case of undefended proceedings and €13,000 in respect of contested proceedings. The letter noted that *“if awarded”*, these fees would be charged to the Complainant’s mortgage account and will be payable by him. The letter further noted that the costs of sale of approximately €5,000 would be payable by the Complainant.

A final receiver appointment notice letter dated **14 September 2016** was sent to the Complainant’s residential address noting an arrears balance of €27,472.90. The letter noted that the Provider had decided to appoint a receiver over the secured property in accordance with statutory powers under the mortgage deed and that the receiver would take control of

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the tenancy and send rent collected, directly to the Provider. The letter noted that the Complainant:

“will be liable for all costs associated with the appointment of the receiver, along with any related expenditure which is incurred in the course of the receivership proceedings. Those costs will be deducted prior to any lodgements made to your mortgage account.”

The letter requested documentation and information in relation to tax, rental, compliance and insurance. The letter stated that unless the Complainant made contact within seven days to clear the arrears in full, it would appoint a receiver without further notification to him.

Telephone Calls in relation to the Fees

There was a call between the Complainant and a representative of the Provider, Z, in September or October 2016. I am unable to determine the date of this call as the Provider has sent all recordings to this Office which are undated and in no particular order. This has made the job of determining the timeline of events particularly difficult.

On this call, the Complainant stated that he was willing to clear his arrears balance in full but would not clear the balance relating to the legal fees that have been applied to his account as he was disputing these. The Provider’s representative stated that the Provider would not accept his failure to pay the legal fees and that if he did pay the arrears balance minus the fees, there would be a small balance on the account in relation to those legal fees which would remain payable by him. The Complainant asked repeatedly for a figure to be sent to him representing the balance of the account without the fees. He requested that the Provider confirm when he was alerted to the fact that these would be applied to the account and the Provider’s representative referenced the letter of demand of 12 September 2014 (above) which stated that the Complainant would be liable for the cost of Circuit Court proceedings up to approximately €4,500.

The Complainant rightly pointed out that it had not gotten to that stage (ie the issue of proceedings) as he had cleared the arrears on his account. The Provider’s representative stated that the Provider had to commence work on this and that the Complainant was liable for the fees. This was clearly disputed by the Complainant. There is also reference on this call to the Provider stating that it “is appointing a rent receiver” and which suggests to me that the receiver had not been appointed at that stage, though the process may have been in train. The Complainant also informed the Provider of the difficulties he was having to evict a tenant causing property damage to the apartment and who was not paying. He indicated that he had informed the local branch of this before and this was the reason for the delay in payments.

The Provider stated that it “will proceed” with the receivership unless the arrears are cleared. The Complainant stated that he was receiving a social welfare cheque in respect of rent of approximately €700 per month and topping up himself. He was informed that he was in arrears of approximately 14 months. He stated that he would pay €10,000 the following

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week and Z stated that he would send him a letter in relation to the €10,000 repayment, and statements for 2014, 2015 and 2016. The Complainant then said he would pay the balance closer to Christmas.

This is a crucial call in my opinion. Firstly, it is surprising that a complaint was not noted by the Provider in relation to the legal fees which been added to the Complainant's account in light of this call. No one hearing the Complainant's proposal to clear the account other than the fees, and his dispute as to whether those fees should have been applied to his account, would have been in any doubt that he was raising a complaint in relation to this issue. Secondly, the Complainant offered numerous times to clear the account in full other than the fees balance. This appears to have happened before the Provider appointed a receiver. It raises the question as to why the Provider proceeded to appoint a receiver in those circumstances, when the Complainant had indicated his willingness to clear the arrears on the account other than in relation to legal fees which he disputed. Thirdly, the Complainant requested on multiple occasions that he get confirmation of the balance of his account, that excluded the fees that had been added. The Provider could or would not assist him with this as it insisted that the legal fees had been added validly to his account. He was offered only statements that included the relevant fees.

I note from the account statement that the Complainant cleared the arrears in the account in full, on 23 November 2016 in the sum of €33,727.37, but does not appear to have paid the €10,000 promised on the week after the call.

Complaints Handling

A formal complaint was logged on 27 January 2017 in respect of the fees that had been charged to the Complainant's account. The Complainant advised that he was led to believe on a call in September 2016 that if he cleared his arrears, the Provider would wipe the legal fees that had been built up in the sum of €152.60. A complaint acknowledgement letter dated 3 February 2017 was sent to the Complainant. Having listened to the available call which I believe is the one referred to by the Complainant, I do not accept that the Provider's representative committed to clearing the legal fees that had been applied, if the arrears were cleared.

In an undated call (possibly 23 March 2017), the Complainant raised a concern that he was waiting to hear from the Provider in relation to the removal of the legal fees from his account and would set up a direct debit once they had been removed. He also expressed serious concern that he had been informed that a solicitor's firm had written to his tenants threatening to change the locks in the apartment. No letters from the solicitors firm or the receiver to the tenants have been furnished to this office in the course of this complaint so it is not possible to form a view on it, though the allegation is serious. A representative, Q, was to call him back that day but did not do so and the Complainant had to ring back a week later.

The next representative, D, had no access to the notes of the previous call and was unable to assist the Complainant in relation to his ongoing query regarding the removal of the fees from his account. D stated that he was unable to re-direct his call to the complaints

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department but would email it and request an update for the Complainant. The Complainant stated once again that he would set up a standing order, once the legal fees were sorted out.

The Complainant was sent letters dated **24 February, 27 March, 26 April, 25 May, and 23 June 2017** noting that the investigation was ongoing. By letter dated **27 June 2017**, the Provider responded to the complaint as follows:

"My understanding of your complaint is that you are dissatisfied with the solicitor's fees applied to your account and you state that you were advised that these would be reversed as long as you cleared the arrears.

I have investigated this matter and am now in a position to respond.

Having reviewed the above account I am unable to locate where you have been advised that the solicitor's fees would be returned following you clearing the arrears. Please note that the [Provider] is not in a position to reverse these fees.

I note that there is currently an arrears balance on the above mortgage account. Please contact the Collections Department on [number] to discuss your account.

I trust this clarifies the matter for you. However, if you are dissatisfied with the [Provider]'s response to your complaint you may take that letter for referral to the Financial Services Ombudsman for adjudication."

The complaint in question was logged in January 2017. I have noted above that in a call in around September 2016, Complainant raised a complaint in relation to the legal fees applied to his account but this was not logged as a complaint. It therefore took the Provider six months from the date of the complaint, or nine months from the initial complaint/query, for it to respond to the Complainant stating that the legal fees were properly applied, but without any attempt to set out the amount of fees that had been applied, explain the rationale for the application of the fees, or to explain the delay that had occurred. In the meantime, the Complainant had made a number of calls to the Provider trying to sort out the situation, trying to keep his account from going into arrears, and requesting that the legal fees be cleared so that he could set up a direct debit and keep his account in order. This is very unsatisfactory.

The author of the letter of 27 June 2017, X, and the Complainant then had two phone calls dated **12 July 2017** and **18 July 2017**. On 12 July 2017, the Complainant raised concerns that he was unaware that charges were to apply to his account and this was contrary to the Consumer Protection Code. He stated that he the Provider had agreed to remove legal fees on a call on the 21 September 2016 if the arrears were cleared and it had promised to call him back by 29 September but this did not happen.

He stated that when he cleared the arrears in full on 23 November 2016, he deliberately left €152.50 on the account reflecting the legal fees that have been applied. He noted that thereafter about €2,000 in fees had been charged to his account. He stated that he knew nothing about the appointment of a rent receiver and that these fees were being added to

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his account over a six-month period while he was waiting for the Provider to investigate the application of fees on his account. He explained that the arrears balance related to a bad experience he had had with a tenant who refused to pay rent and had done considerable property damage, but who he was unable to evict owing to the fact that the tenant had a child living with her. X stated that the Provider was entitled to apply legal fees in working towards getting the account back in order and that letters were sent to the Complainant before the rent receiver was appointed. The Complainant explained that the property management company had been receiving the rent and sending money directly to the Provider and that no rent receiver had been doing that job. X committed to investigating the issue for him.

On a follow-up call on **18 July 2017**, X stated that the Complainant had been sent letters regarding the imminent appointment of the rent receiver. This was denied by the Complainant and X committed to sending him out copies of the correspondence sent to him. X also committed to organising a breakdown of the costs from the receiver and the legal fees. The Complainant raised a serious concern that the rent receiver was not discharged, when he cleared his account in full on 23 November 2016. X stated that the reason for this decision was that due to the long-standing arrears on the accounts, the Provider felt it best to leave the rent receiver in place.

X followed up on this call by letter dated **24 July 2017** as follows:

"Further to our conversation on the 18th of July 2017 in respect of fees applied to the above mortgage, I have enclosed two letters from [the Provider] and [the rent receiver] advising you of the appointment of a Rent Receiver. The letter were issued on the letter of the 14th September 2016 outlines that your you will be liable for all cost associated with the appointment of this Rent Receiver. (sic) A further letter was issued by [the rent receiver] 9th November 2016 confirming there appointment of a Rent Receiver. (sic)

As per your request, the [Provider] will issue you with a breakdown of the costs and work carried out by [the rent receiver] and also a breakdown of cost in relation to the solicitor fees that have been previously applied to your account. These will be sent in due course and under separate cover."

I have been furnished with a letter from the rent receiver addressed to the Complainant to his home address dated **9 November 2016**, advising him that the receiver had been appointed over the property in question by deed of appointment dated 31 October 2016. The letter states that as a consequence of the appointment, all rental payments must be paid to the rent receiver and that the Complainant's authority to deal with the rent collection and property management has ceased. The letter also sought details and documentation in relation to tax, rental, compliance and other issues.

I note that the Complainant has stated that he did not receive this letter and was therefore unaware that a rent receiver had been appointed. On the basis of the documentation before me, however, I am satisfied that this letter was in fact sent to the Complainant notifying him of the appointment of the rent receiver.

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Legal Fees

A breakdown of the legal fees applied was sent to the Complainant by letter dated **19 July 2017**. The Provider stated that the total sum added to the accounts was in the sum of €1,536.75 and the breakdown was as follows:

Fees

Legal demand fee €98.40
Draft grounding affidavit €707.25
Legal demand fee €147.60
Legal offer fee €61.50
Rehabilitation fee €369.00
Total fees including VAT €1,383.75

Disbursements

Property valuation €12.17
Occupancy check €135.30
Land registry search €5
Total disbursements including VAT €153

The letter further stated that the legal costs applied the account related to the engagement and legal proceedings preparatory work completed by solicitors. It further states that under section 12 of the mortgage terms and conditions, the Complainant was fully liable for any legal costs incurred by the Provider on the recovery of mortgage property.

The Provider has indicated that the breakdown of the receivership fees as: a receiver appointment fee of €615, receiver monthly management fees in the sum of €73.80 per month, and an insurance premium of €472.50.

Clause 12 of the terms and conditions of the mortgage provides that:

"12.2 The Mortgagor covenants to indemnify the [Provider] against and to pay all costs and charges incurred by the [Provider] of and incidental to:

....

- the protection, realisation and enforcement of [the Provider's] security including all legal costs charges and expenses incurred by the Provider or on its behalf.*

12.3 all monies to which this Condition applies shall bear interest at the Appropriate Rate from the date the same shall have been made or incurred until the date of actual repayment to a reimbursement of [the Provider] and where payment falls into arrears shall be subject to interest at the appropriate Rate as provided for in the Conditions.

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“12.4 All moneys to which this Condition applies shall be a debt due from the Mortgagor to [the Provider] and shall form part of the Total Debt secured by the Property and be payable immediately to [the Provider] by the Mortgagor.

12.5 All legal costs and fees shall be a solicitor and own client full indemnity basis.”

The terms and conditions were accepted by the Complainant on 9 November 2007 in the presence of his solicitor. The acceptance also confirmed that the Complainant’s solicitor fully explained the terms and conditions to him.

I note the terms of Clause 12 of the terms and conditions of the Complainant’s mortgage account and accept that this provides for the payment by the Complainant of legal costs incurred by reason of the protection, realisation and enforcement of its security, and that these costs can be added to the total debt secured by the property.

This is not the end of the matter however. Under the Consumer Protection Code (CPC), the Provider is obliged to disclose charges and bring information clearly to the attention of the customer. Provision 2.6 CPC states that:

“A regulated entity must ensure that in all its dealings with customers and within the context of its authorisation it: make full disclosure of all relevant material information, including all charges, in a way that seeks to inform the customer.”

Provision 4.1 states:

“A regulated entity must ensure that all information it provides to a consumer is clear, accurate, up-to-date, and written in plain English. Key information must be brought to the attention of the consumer. The presentation must not disguise, diminish or obscure important information.”

I have highlighted above that the letters of demand sent to the Complainant which advised him of legal fees which might be added to his account, referred only to legal fees where possession proceedings were instituted. There was no mention in these letters of the addition of legal fees for the preparatory work in relation to the issue of proceedings which it now appears that the Provider has claimed. In my view, the Provider has therefore failed to comply with Provisions 2.6 and 4.1 CPC as it has not brought key information to the attention of the Complainant in respect of fees and has not made full disclosure of relevant information including charges in a way that seeks to inform the Complainant.

In relation to the appointment of a receiver, I am satisfied that the receiver appointment letters of July and September 2016 properly informed the Complainant that the costs associated with the appointment of the receiver were payable by him, though the likely cost of same was not advised. I note that the receiver was appointed on 31 October 2016 when the account was in arrears of almost €30,000. However in a phone call around the same time, the Complainant committed to clearing all of the arrears on the account except for the legal fees which he disputed. I am satisfied that all arrears were cleared as a statement of

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account indicates that a sum of €33,727.37 was lodged in cash to the Complainant's account on 23 November 2016.

Rather than discharging the receiver at this point, the Provider decided to leave the rent receiver in place because of what it has described as the history of arrears on the account. Month by month, further fees were applied to the Complainant's account while he was waiting for the Provider to come back to him in relation to the complaint he had raised in relation to the application of fees to his account. It is far from clear what, if anything, the rent receiver was doing during this period as I am satisfied on the evidence produced by the Complainant that the rent was being received by the property management company appointed by him, and paid from there to the Provider. It appears from a submission from the Provider dated 22 November 2018, that a number of letters were sent by the receiver to the occupiers of the property but these have not been furnished in evidence and are in dispute. At no stage was rent actually received by the receiver appointed and it does not appear that contact was made by the receiver with this property management company until after the Provider had made a decision to terminate the appointment, per an email from the company.

As a result of a July 2017 complaint raised by the Complainant to the Provider's representative, X, it appears that X sought further information in relation to the appointment of the rent receiver and the fees that had been applied to the Complainant's account. In an internal email dated 12 July 2017, X noted that these were being applied to the account with no rent being received. He accepted that the Complainant had kept up his repayments since clearing the arrears balance in November 2016 (bar a disputed legal fees sum of €152.60) and had even paid off some of the fees applied to the account. He stated his belief that the account should not be with the rent receiver, as the receiver was only adding fees to the account for no reason, when arrears were resulting from the application of those fees. He requested that the matter be looked into. The response from X was to the effect that the rent receiver's appointment should be terminated but that the Provider was correct in appointing the rent receiver at the time, based on the arrears history of the account.

On any analysis, it cannot be fair or reasonable for a Provider to seek to charge a customer for fees associated with a receiver, when the arrears on the account have been cleared in full and the only reason for the continued appointment of the receiver appears to be a holding pattern to see whether or not arrears will accrue once again. If the Provider wishes to have a receiver appointed on standby, it cannot in my opinion, be the case that it can then oblige its customer to pay the fees associated with such an appointment. Such would be an entirely unjust situation.

A further issue that concerns me is that the Provider has indicated that the fees applied to the account reflect those invoiced to it by solicitors and the appointed receiver. The Provider has not, however, provided copies of the relevant invoices. In addition, and of greater concern, the Provider has not put forward a sufficient justification for either the content/subject matter of the relevant fees, or of the quantum of the fees charged by the third-party receiver and solicitors. In the course of proceedings, legal fees can be sent to

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taxation but this Office does not and cannot operate as a Taxing Master. If the Provider wishes to add fees and charges to a customer's account, it is incumbent upon the Provider to provide a sufficient basis for doing so. In the present case, I am not satisfied that the Provider has done so.

In all the circumstances of the case, and despite Clause 12 of the mortgage terms and conditions, I am not satisfied that the Provider was entitled to add the disputed legal fees and receivership fees to the Complainant's account. I therefore consider it appropriate to uphold this complaint.

I note that the Provider has refunded some of the fees charged to the Complainant's account. As set out above, there continues to be a lack of clarity from the Provider as to exactly what was charged, exactly what was refunded, and exactly what fees remain on the account (paid or unpaid). It appears to me that the Provider has refunded most of fees associated with the receivership, but has not refunded the legal fees added to the account.

Accordingly, I intend to direct that, as a matter of priority, the Provider remove all of the legal and receivership fees that have been applied to the Complainant's account and to credit him for any payments that he may have inadvertently made in respect of same. I further intend to direct that compensation be paid to the Complainant for the fact that these fees were wrongly applied to his account over the relevant period. These fees appear to have considerably added to the stress that the Complainant was already under in respect of the arrears balance on his mortgage account, which initially arose from a tenant who refused to pay rent and caused damage to the property in question.

It is also clear to me that the Provider showed poor communications and complaint handling in relation to the issue of these fees applied to the account. As noted above, the original complaint made by the Complainant in respect of fees in September 2016 was not logged by the Provider. Once the complaint was logged in January 2017, it still took a further six months for the Provider to respond to the complaint. That response was as inadequate as it was late, in that it failed to explain what fees had been applied to the Complainant's account, why they had been added, and the basis upon which the Provider believed that it had been entitled to add those fees.

I acknowledge that the situation was much improved by the involvement of X in the Complainant's case from July 2017 onwards, who thereafter dealt properly with the complaint (though, as above, I do not agree with the conclusion formed by the Provider in respect of its entitlement to add the relevant fees to the account).

I am further concerned by the fact that the Provider would not provide the Complainant with an arrears figure in September 2016 which excluded any fees that had been applied to his account. While I acknowledge that the Provider was entitled to continue to assert its rights to add those fees at the time, it would and should have been in a position to provide the Complainant with the figure that he sought, and to deal with the question of fees separately. The information that the Complainant was seeking should have been made available to him but was not. In this regard, I also reiterate the concern raised earlier in this decision that even at this point, the Provider exhibited confusion or a lack of clarity in respect

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of what fees had been applied and what fees were refunded to the Complainant's account. In any situation where the Provider wishes to add fees to a customer's account, it is incumbent on the Provider to keep meticulous records of such fees and to provide all information in relation to those fees, including a breakdown of the fees to a customer, on request.

In light of the wrongful application of the fees in question, and the ensuing failures by the Provider in communication and complaints handling, I consider it appropriate to uphold this complaint.

Conclusion

My Preliminary Decision is that this complaint is upheld pursuant to **Section 60(1)** of the **Financial Services and Pensions Ombudsman Act 2017** on the grounds prescribed in **Section 60(2)(a), (b) and (g)**.

Pursuant to **Section 60(4) and Section 60 (6)** of the **Financial Services and Pensions Ombudsman Act 2017**:

- I direct the Provider to rectify the conduct complained of by conducting an overall review of the account within a period of 1 month from today, to establish the exact figure for the various fees debited to the account, and I direct the Provider to then refund all such fees, including the appropriate interest adjustment, to the Complainant's mortgage account within 35 days of the conclusion of the account review.
- I also direct the Provider to make a compensatory payment to the Complainant in the sum of €6,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.
- I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in **Section 22** of the **Courts Act 1981**, if the amount is not paid to the said account, within that period.
- The Provider is also required to comply with **Section 60(8)(b)** of the **Financial Services and Pensions Ombudsman Act 2017**.

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

MARYROSE MCGOVERN
DIRECTOR OF INVESTIGATION, ADJUDICATION AND LEGAL SERVICES

6 August 2019

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Pursuant to *Section 62 of the Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.

